

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

AMERICAN BUILDING CONTRACTORS, INC.

Employer

and

Case 4–RC–20046

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 98

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer, a building construction and management company, renovates newly purchased buildings, secures tenants and manages the properties. The Petitioner seeks to represent a unit of two journeyman and apprentice electricians. The Employer would dismiss the

petition asserting that the unit consists of one employee as the second employee in the petitioned for unit, Jay Slobodinsky, is a supervisor within the meaning of Section 2(11) of the Act.

Slobodinsky first worked for the Employer from February 1997 to November 1998. During that time period, he was the Employer's Electrical Division Manager. In that capacity, he was responsible for all of the company's electrical work, including supervision of other electrical employees,<sup>1</sup> and he was compensated in part with bonuses based on the Employer's profits. Slobodinsky returned to work for the Employer in June 2000. According to Slobodinsky, he informed the Employer's President, Kelly DeFeo, that he did not want to perform paperwork or be involved with hiring and firing employees. DeFeo agreed that Slobodinsky would run the company's electrical jobs and be paid hourly wages, with fringe benefits but no profit-based bonuses. During Slobodinsky's absence, the Employer did not have an Electrical Division.

According to Slobodinsky, before he returned to work, he asked DeFeo if he could bring Steve Coletta, who had worked with him as an apprentice for a previous employer, to work with him for the Employer. Slobodinsky contacted Coletta several days before he started work and asked if he was interested in working for the Employer. Coletta accepted and began working for the Employer a short time after Slobodinsky. Other than Slobodinsky, no representative of the Employer interviewed Coletta or any other candidates for the job before Coletta was hired.

DeFeo testified that Coletta was not hired until after Slobodinsky started work for the Employer, when he realized he needed extra help. According to DeFeo, if anyone were to be hired in the future, Slobodinsky would screen the applicant but DeFeo would make the final hiring decision. Slobodinsky testified that he informed DeFeo that if there is too much work in the future, the Employer should employ a subcontractor.

Slobodinsky is in charge of completing all of the Employer's electrical work, with Coletta's assistance. While he reports to DeFeo, neither DeFeo nor any other manager of the Employer has personal knowledge of how to perform electrical work. The Employer gives Slobodinsky the blueprints for the job or the floor plans of the site, and Slobodinsky decides what work needs to be done. He then helps lay out the jobs, orders materials and coordinates the work with the customers as needed. If there is no blueprint for the electrical work, Slobodinsky will decide where to place the outlets and light fixtures. Slobodinsky is not generally involved with estimating the cost of the work, but on one occasion he provided expertise as to what a job would likely cost.<sup>2</sup> He spends the vast majority of his time working with the tools performing tasks such as wiring lights, receptacles, electrical panels and transformers. DeFeo occasionally visits the jobs sites, but such visits are infrequent.

Slobodinsky tells Coletta where to report for work, and the two men generally drive to work together. Slobodinsky assigns work to Coletta on a daily basis; in general, Slobodinsky

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<sup>1</sup> At times he was the only employee who performed electrical work for the Employer, but at other times there were as many as five employees.

<sup>2</sup> Slobodinsky has performed six jobs for the Employer since his return in June 2000.

retains the more difficult work for himself and gives the remainder to Coletta. Slobodinsky does not need to train Coletta, who knows how to perform his work on his own, but he looks at Coletta's work to ensure that he has performed it properly. Both men's regular hours are from 7:00 a.m. to 3:30 p.m., and they both punch a time clock. On one occasion, when Slobodinsky determined that their work was complete for the day, he decided that he and Coletta could leave early, and they did so. At that time, DeFeo was in Florida and was not available to be contacted. Slobodinsky testified that if Coletta tells him that he needs to leave early, he does not have the authority to require him to stay.

Before Coletta was hired, he told Slobodinsky that he wanted \$15 per hour, and Slobodinsky relayed this request to DeFeo, who approved it. Slobodinsky does not have the authority to give him a pay raise. Slobodinsky is paid \$25 per hour, and receives health insurance and the use of a company truck. He has only worked overtime once since he returned to work for the Employer, on a Saturday<sup>3</sup>, and Coletta has not worked overtime at all. Coletta expects to receive health insurance benefits after completing a probationary period.<sup>4</sup>

DeFeo testified that Slobodinsky has the authority to discipline, discharge or lay off Coletta. The Employer, however, presented evidence as to only a single incident related to discipline. According to DeFeo, Slobodinsky reported that Coletta was frequently absent and that Slobodinsky said he told Coletta that he would have to stop missing work or leave the company. Slobodinsky would report to DeFeo as to future developments. According to Slobodinsky, he told DeFeo that Coletta had taken off a few days but there was no mention of future consequences. Slobodinsky testified that he told Coletta that if DeFeo were to look at his time sheets, he would be in trouble.

A finding of supervisory status is warranted only where the individual in question possesses one or more of the indicia set forth in Section 2(11) of the Act. *Providence Hospital*, 320 NLRB 707, 725 (1996), *enfd.* 121 F.3d 548, 156 LRRM 2001 (9<sup>th</sup> Cir. 1997); *The Door*, 297 NLRB 601 (1990). The statutory criteria are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Juniper Industries*, 311 NLRB 109, 110 (1993). The statutory definition specifically indicates that it applies only to individuals who exercise "independent judgment" in the performance of supervisory functions and who act in the interest of the Employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. *Providence Hospital*, *supra*, 320 NLRB at 725. The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*; *Juniper Industries*, *supra*, 311 NLRB at 110. The authority effectively to recommend, "generally means that the recommended action is taken with *no* independent investigation by an individual's superiors, not simply that the recommendation ultimately is followed." *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982) (emphasis in original). The

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<sup>3</sup> Slobodinsky made the decision himself to work overtime on that date.

<sup>4</sup> The record does not specify the length of the probationary period.

sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Robert Greenspan, DDS*, 318 NLRB 70 91996) enfd., mem. 101 F.3d 107, 153 LRRM 2704 (2<sup>nd</sup> Cir. 1996), cert. denied 117 S.Ct. 68, 153 LRRM 2736 (1996), citing *NLRB v. Lindsay Newspapers*, 315 F.2d 709, 712 (5<sup>th</sup> Cir. 1963); *Gaines Electric*, 309 NLRB 1077, 1078 (1992); *Ohio River Co.*, 303 NLRB 696, 714 (1991), enfd. 961 F.2d 1578, 140 LRRM 2120 (6<sup>th</sup> Cir. 1992). Job descriptions or job titles suggesting the presence of supervisory authority are not given controlling weight. Rather, the Board insists on evidence supporting a finding of actual as opposed to mere paper authority. *East Village Nursing Center v. NLRB*, 165 F.3d 960, 160 LRRM 2342, 2345-2346 (D.C. Cir. 1999); *Store Employees Local 347 v. NLRB*, 422 F.2d 685, 71 LRRM 2397, 2399-2400 (D.C. Cir. 1969); *NLRB v. Security Guard Services*, 347 F.2d 143, 66 LRRM 2247-2250 (5<sup>th</sup> Cir. 1969), enfg. 154 NLRB 8 (1965); *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

The burden of establishing supervisory status is on the party asserting that such status exists. *Fleming Companies, Inc.*, 330 NLRB No. 32, fn. 1 (Nov. 30, 1999); *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993); see *Bennett Industries*, 313 NLRB 1363 (1994). The Board has cautioned that the supervisory exemption should not be construed too broadly because the inevitable consequence of such a construction would be to remove individuals from the protections of the Act. *Providence Hospital*, supra, 320 NLRB at 725; *Northcrest Nursing Home*, supra, 313 NLRB at 491. Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Phelps Community Medical Center*, supra, 295 NLRB at 490. The legislative history of Section 2(11) makes it clear that Congress intended to distinguish between employees performing minor supervisory duties and supervisors vested with genuine management prerogatives, and did not intend to remove individuals in the former category from the protections of the Act. S. Rep. No. 105, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess., 4 (1974), reprinted in 1 Legis. Hist. 407, 410 (LMRA 1947). The legislative history also shows that Congress considered true supervisors to be different from lead employees or straw bosses that merely provide routine direction to other employees as a result of superior training or experience. *Id.*, reprinted at 1 Legis. Hist. at 410 (LMRA 1947). *Providence Hospital*, supra, 320 NLRB at 725; *Ten Broeck Commons*, 320 NLRB 806, 809 (1996). An individual will not be found to be a supervisor unless he or she has a “kinship to management.” *Adco Electric*, 307 NLRB 1113 fn. 3 (1992), enf’d. 6 F.3d 1110, 144 LRRM 2763 (5<sup>th</sup> Cir. 1993); *NLRB v. Security Guard Service*, supra, 66 LRRM at 2250. Further, “supervisory direction” of other employees must be distinguished from direction incidental to an individual’s technical training and expertise, and technical employees will not be found to be supervisors merely because they direct and monitor support personnel in the performance of specific job functions related to the discharge of their duties. *Robert Greenspan, DDS*, supra, 318 NLRB at 76; *New York University*, 221 NLRB 1148, 1156.

There is no evidence that Slobodinsky has the authority to transfer or promote employees or to adjust complaints or grievances. The Employer’s claim of supervisory status rests on his involvement in directing and assigning work, his authority to discipline, discharge and lay off employees, and his purported hiring of Coletta. The record establishes that in June 2000 Slobodinsky returned to work with less responsibility and with changed terms and conditions of employment. Thus, he informed DeFeo that he did not want to perform any paperwork and did

not want hiring and firing authority. Therefore, in analyzing whether he meets the Section 2(11) criteria, only his current duties and responsibilities are relevant.

Slobodinsky testified that the Employer hired Coletta before Slobodinsky returned to work for the Employer, while DeFeo testified that Slobodinsky did not request to hire Coletta until after he had returned. As the evidence is in conflict as to whether Slobodinsky has been involved in hiring since his return, it cannot form the basis for a supervisory finding. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Moreover, even if Slobodinsky had recommended one individual for employment, this isolated act would not be determinative of his supervisory status. Although DeFeo testified that Slobodinsky would be in charge of determining the qualifications of applicants in the future, he further indicated that he would retain the final decision-making authority and in any case, mere statements of authority, never exercised, are insufficient to justify a finding of supervisory status. *McAlester General Hospital*, 233 NLRB 489, 590 fn. 8 (1977). There is no evidence that Slobodinsky has ever disciplined Coletta. To date, Slobodinsky has done nothing more than to suggest to Coletta that he should be concerned with the possibility of DeFeo reviewing his time sheets. This suggestion constitutes no more than advice to a junior employee and falls far short of establishing disciplinary authority. The record also fails to establish that Slobodinsky has independent authority to responsibly direct or assign work to Coletta. On the job, Slobodinsky's instructions to Coletta are of the type that a journeyman typically gives to an apprentice, based on his superior experience. See *Gerber Co.*, 270 NLRB 1235, 1237-1238 (1984); *George C. Foss Co.*, 270 NLRB 232, 234 (1984) enfd. 752 F.2d 1407 (9<sup>th</sup> Cir. 1985); *IBEW Local 915 (Borrell-Bigby Electrical Company, Inc.)*, 225 NLRB 317, 319 (1976). While Slobodinsky checks Coletta's work, the Board has held that checking the work of less skilled employees and pointing out errors is not an indication of supervisory status. *Control Services, Inc.*, 214 NLRB 421, 431 (1994); *Phelps Community Center*, supra. In fact, the record shows that Slobodinsky spends the bulk of his time performing the tasks of an experienced journeyman electrician, rather than directing the work of the only other employee at the job site. Finally, although Slobodinsky is paid far more than Coletta and receives some additional benefits, this secondary indicium of supervisory status cannot transform him into a statutory supervisor in the absence of any evidence that he possesses at least one of the statutory indicia. *Northcrest Nursing Home*, 313 NLRB 491, 498 (1993); *Billows Electric Supply of Northfield, Inc.*, 311 NLRB 878 (1993). Based on the foregoing, I find that the Employer has not carried its burden of proving that Jay Slobodinsky is a supervisor within the meaning of the Act. *George C. Foss Co.*, supra; *Gerber Co.*, supra. Cf. *Micronesian Telecommunications Corp.*, 273 NLRB 354, 359 (1984).

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**All journeyman electricians and apprentice electricians employed by the Employer, excluding all other employees, office clericals, guards and supervisors as defined in the Act.**

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,<sup>5</sup> subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Additionally, eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.<sup>6</sup> Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

**INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS,  
LOCAL UNION NO. 98**

**LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within **7** days of the date of this Decision **3** copies of an election eligibility list, containing the **full** names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The

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<sup>5</sup> Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that The Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

<sup>6</sup> *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967).

list must be clearly legible, and computer-generated lists should be printed in at least 12-point type. In order to be timely filed, such list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **September 20, 2000**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **September 27, 2000**.

Signed: September 13, 2000

at Philadelphia, Pennsylvania

/s/ Dorothy L. Moore-Duncan  
DOROTHY L. MOORE-DUNCAN  
Regional Director, Region Four

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